No. 09-1430

IN THE

SUPREME COURT OF THE UNITED STATES

MARK D. DAVIS,

Petitioner,

v.

TONYA S. BLACKSTOCK,

Respondent.

Respondent's Brief in Opposition to the

Petition for Writ of Certiorari

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June 24, 2010

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STATEMENT OF THE CASE

This case originated with the Mother's Petition to Modify Custody filed February 6, 2006. (C.5-7) [1]. In said Petition, the Mother alleged that there had been a material change of circumstances affecting the best interest of the minor child necessitating a change in custody. (C.5-7). The Mother further alleged that the current custody arrangement was no longer in the best interest of the child. (C.5-7). The Mother sought modification of the prior Order from the Lawrence County, Tennessee Chancery Court dated September 3, 2003, which had established a pure joint custody arrangement with the parties rotating physical custody of the child every four days. (C.5).

The Mother subsequently filed a Motion to Set Aside the Order dismissing the case and filed an Objection to the Father's Motion to Dismiss. (C.48-50). In said Motion and

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[1] C. ____ references are to the Clerk's record on Appeal from the Lauderdale County, Alabama, Circuit Court Clerk.

Objection, the Mother accurately pointed out to the trial court that neither party had resided in Tennessee since 2001 and the child had never in her lifetime resided in Tennessee. (C.49). Further, the Mother advised the court that there was no hearing set or motion pending in Tennessee until February 23, 2006, when the Father filed a Petition for Custody hearing with the Tennessee Court after having been served with the Alabama Petition and Order setting a pre-trial hearing. (C.48-50).

The mother filed an Amended Objection stating that the Mother's Motion to Dismiss the Father's Tennessee Petition had been granted on March 28, 2006, when the Tennessee Court held a hearing and declined to exercise jurisdiction finding Alabama to be the more convenient forum. (C.58). The Mother asserted that Alabama was the only court with jurisdiction when the Petition was filed under Ala.Code §30-3B-201 and 203 (1975). However, since Tennessee refused to exercise jurisdiction, Alabama certainly was the

sole court with jurisdiction on April 7, 2006. (C.56-59). The trial court held a hearing on April 7, 2006, on the Father's Motion to Dismiss the Alabama petition. Neither the Father nor his counsel submitted any argument or evidence to refute the factual and legal assertions made in the Mother's Amended Objection. The transcript contains no argument from the motion hearing as the Father did not dispute the fact that the Tennessee Court had refused to accept jurisdiction.

The case was tried for three days in August, 2006. On August 31, 2006, the Alabama trial court entered an Order granting the Mother's Petition to Modify and awarding the Mother primary physical custody but continuing joint legal custody. (C. 76-78). The Order established child support payable by the Father. (C. 76-78, C. 84). [2]

The father did not file any post-trial motions to

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[2] The father has not paid child support in accord with the August 31, 2006, Order rendering him significantly in arrears for the past three years and 9 months. Neither did the father post a supercedeas bond to stay execution of these amounts.

challenge any aspect of the Court's Order, but gave Notice of Appeal on October 2, 2006. (C. 85). On June 29, 2007, the Alabama Court of Civil Appeals reversed the trial court's modification of the 2003 custody arrangement. (Appendix F).[3] The mother then filed a Petition for Writ of Certiorari to the Alabama Supreme Court which was granted.

On September 11, 2009, the Alabama Supreme Court reversed the Alabama Court of Civil Appeals decision in thorough and carefully analyzing opinion. (Appendix G).

Petitioner's Application for Rehearing was subsequently denied on February 19, 2010. (Appendix H).

SUMMARY OF THE ARGUMENT

First, the Respondent asserts that the Petitioner's reliance upon Troxel v. Granville, 530 U.S. 57 (2000) is misplaced. Troxel involved grandparent or third party visitation rights, not parental rights. Further, Troxel was

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[3] All Appendix references will be to the Petitioner's Appendix, unless otherwise stated.

very statute and case specific in its findings.

Next, the federal courts, including the US Supreme Court, are courts of limited jurisdiction. Ankenbrandt v. Richards 504 U.S. 689 (1992) specifically stated that federal courts lack jurisdiction over suits for divorce or alimony. The court in Ankenbrandt clarified that child custody decrees also remain outside the federal jurisdiction bounds.

Finally, your respondent asserts that the Alabama Supreme Court, which reversed the Court of Civil Appeals Opinion, which effectively affirmed the trial court decision to modify the joint custodial arrangement which the parties had initially. Primary custody was thus vested with the mother with joint legal custody remaining with the parties. The Alabama Supreme Court held that the ore tenus standard required the reviewing court to give great deferenceto the trial court opinion in according a presumption of corrective to said opinion on appeal. Citing extensively from the record, the court found that the mother had met her burden in

establishing that the best interest of the child would be served by said modification and reversed the Court of Civil Appeals decision, accordingly.

Based upon same, the mother shows that there is no valid basis upon which this court should grant the father's Petition for Writ of Certiorari. Accordingly, the mother moves the court to deny said Petition.

ARGUMENT IN OPPOSITION

TO PETITION

First, the Petitioner's reliance upon Troxel v. Granville, 530 U.S. 57 (2000) is misplaced. Granted, parental rights have been recognized as "fundamental," however, the thrust of Troxel was in the context of third party visitations, in that case, grandparent visitation, not parent visitations. Troxel was based on a very specific Washington state statute and case-related facts.

Further, the Supreme Court and federal courts are courts of limited jurisdiction. Ankenbrandt v. Richards, 504

U.S. 689 (1992). Ankenbrandt addressed the domestic relations exception' s derivation and limits. Id. at 693-695. Ankenbrandt stated that federal courts lack jurisdiction over suits for divorce or alimony. Id at 695-697. The Court clarified that only "divorce, alimony and child custody decrees" remain outside federal jurisdictional bounds. Id. at 703-704.

Utilizing Ankenbrandt, this Court in Marshall v. Marshall, 547 U.S. 293 (2006), further distilled the Ankenbrandt exception. Id at 295-296.

Respondent asserts that under the rationale if Ankenbrandt and Marshall, this Court should decline and deny Petitioner's Petition.

Further, Respondent/Mother shows that the Alabama Supreme Court acted correctly in its rulings that affirmed the trial court. The trial court did not err in its award of primary physical custody to the Mother. The trial court heard testimony ore tenus and the trial court's ruling is presumed

to be correct. Lamb v. Lamb, 939 So.2d 918 (Ala. Civ. App. 2006). The trial court was in the best position to make a custody determination as it hears the evidence and observes the witnesses and appellate courts do not sit in judgment of disputed evidence presented ore tenus. Id.

The Mother presented sufficient evidence to prove numerous material changes in circumstances affecting the best interest of the child to warrant a change in the existing joint custody order. The Mother provided evidence that the child was enrolled in K-4 and that regular attendance was important to the child's academic, social and emotional development. The Mother's evidence reflected that the current custody plan was not working due to the Father's continuing increasing efforts to control and micro-manage making even minor decisions impossible. The Mother proved that the Father had failed to move to Florence, Alabama, as he had repeatedly stated he would in order to prepare for the child's entry into school. Through evidence and testimony,

the Mother proved that the child was experiencing increased anxiety and unhappiness over the constant changing schedule. The Mother proved that the current schedule was increasingly disruptive to the child's life in that the child was unable to participate in cheerleading, T-ball and other activities.

Any one of these changes would support a change of custody. Together, the evidence presented by the Mother overwhelmingly supported and confirmed the trial court's decision to modify custody. Said decision was subsequently affirmed by the Alabama Supreme Court and is due to be upheld by this Court as well.

The Alabama Supreme Court opinion of September 11, 2009 (Appendix G) is well founded in applicable law and due to be affirmed through denial of the Petitioner's Petition for Writ of Certiorari.

The Supreme Court held that the ore tenus standard required the reviewing court to give deference to the trial

court opinion according a presumption of correctness on appeal. Ex parte Davis v. Blackstock, ___ So. 3rd ___ (2009 Ala. Lexis 211) at *8-11. The Supreme Court cited extensively from record on appeal in sustaining the trial court decision and reversing the Alabama Court of Civil Appeal as well as buttressed said findings with well established case law. Lamb v. Lamb, 939 So. 2d 918 (Ala. Civ. App. 2006); Ex parte Bryowsky, 676 So. 2d 1322 (Ala. 1996); Ex parte Foley, 864 So. 2d 1094 (Ala. 2003).

The Court of Civil Appeals concluded that the mother failed to carry her burden of proof. The Supreme Court pointed out, however, that the proper question was whether the circuit court heard sufficient evidence from which it could have reasonably made the factual findings and reached the conclusion it reached. The Court found that the Court of Civil Appeals failed to give appropriate deference to the circuit court's findings and judgment. It noted that the mother introduced evidence that the Tennessee Court of Appeals had

expressed concern about the four-day rotating custody arrangement when the child began school. Also, the father failed to move closer to the mother when school started, as he had promised to do. There was also extensive testimony that the child suffered anxiety at the custody exchanges and that daily attendance at the more structured pre-K program was vital to her continuing education. "The foregoing testimony would support a conclusion by the circuit court that the four/four custody arrangement had become problematic for the child and that the problems were only going to get worse when the child began the pre-K program." Blackstock at ____ (appendix G at 130a). The Court finally held that the Court of Civil Appeals misapplied *Watters v. Watters*, 918 So. 2d 913 (Ala. Civ. App. 2005), in holding that the mother did not meet her burden of showing a material change in circumstances since the last custody order. The Court noted that the Court of Civil Appeal's conclusion that the mother presented no evidence that the child would not continue to

thrive in pre-K under the four/four custody arrangement was in conflict with the testimony presented. The Court also pointed out that to the extent the statement by the Court of Civil Appeals that implied that a "natural progression" to pre-K could not constitute a material change in circumstances, it was at odds with the practical realities of life. Blackstock at _____. (Appendix G at 133a).

> "To say that a change of custody cannot be based on the change in the child's needs simply because the change itself reflects a 'nat ural progression' is to ignore the best interests of the child in favor of a more rigid, court-manufactured view, particularly where, as in the present case, there is not indication that the 'natural progression' was considered as part of the basis for the propr judgment." Blackstock at _____. (Appendix G at 134a).

In view of the foregoing your Respondent respectfully

requests the Petition for Writ of Certiorari be denied.

CONCLUSION

The father has failed in his Petition for Writ of Certiorari to establish a valid and legal basis upon which he is entitled to have said Petition granted. In view of the applicable law and the limited jurisdiction afforded this court, the father's Petition for Writ of Certiorari is due to be denied. The mother respectfully requests that said petition be denied accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of June, 2010, a copy of the above and foregoing was served upon the Mark D. Davis, 569 County Road 281, Florence, AL 35633, Florence, Alabama 35630 by U. S. Mail, postage prepaid.

LINDSEY MUSSLEMAN DAVIS